92-1204

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

KEVIN LEE MILAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE FEDERAL SENTENCING GUIDELINES ARE UNLAWFUL, INVALID, AND UNCONSTITUTIONAL TO THE EXTENT THAT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

II. WHETHER THE FEDERAL SENTENCING GUIDELINES VIOLATE DUE PROCESS TO THE EXTENT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

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No. _____

In The

Supreme Court of the United States

October Term, 1992

KEVIN LEE MILAM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN LEE MILAM, Petitioner herein, by and through his appellate attorney of record, CHARLES LOUIS ROBERTS, hereby petitions this Court to grant a Petition Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

CITATIONS TO OPINIONS BELOW

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit in *United States v. Kevin Lee Milam,* No. 91-8207 was entered on October 7, 1992; and this Order is reproduced herein as Appendix, p. 3a. The

Opinion of the panel for the United States Court of Appeals for the Fifth Circuit in *United States v. Kevin Lee Milam,* No. 91-8207 was entered as an unpublished Slip Opinion on August 20, 1992, and is reproduced herein as Appendix, p. 1a.

JURISDICTION

The denial of rehearing by the United States Court of Appeals for the Fifth Circuit was entered on October 7, 1992. This Petition is timely filed within ninety (90) days of October 7, 1992, pursuant to Supreme Court Rule 20.01. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTORY PROVISIONS AND RULES INVOLVED

1. The United States Constitution Amendment V reads as follows in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .
>
> **United States Constitution, Amendment V**

2. The United States Code, 28 U.S.C. § 991 reads as follows:

> § 991. United States Sentencing Commission; establishment and purposes
>
> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission

which shall consist of seven voting members and one nonvoting member***

(b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices;

28 U.S.C. § 991

3. The United States Code, 28 U.S.C. § 3553 reads as follows:

§ 3553. Imposition of a sentence.

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) The nature and circumstances of the offense and the history and characteristics of the defendant;

(2) The need for the sentence to be imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

* * *

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense. [Emphasis supplied]

18 U.S.C. § 3553

4. The Federal Sentencing Guidelines, § 1B1.3 reads as follows:

§ 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range)

(a) *Chapters Two (Offense Conduct) and Three (Adjustments),* Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) all acts and omissions committed or aided and abetted by the defendant, or

for which the defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts or omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts or omissions; and

(4) any other information specified in the applicable guideline.

STATEMENT OF THE CASE

A. In General:

On July 3, 1990, KEVIN LEE MILAM, Appellant herein, was indicted in a superseding indictment in the United States District Court for the Western District of Texas for violation of 18 U.S.C. § 371 – Conspiracy and 18 U.S.C. § 659, Theft from Interstate Shipment. On December 4, 1990, in the trial of Kevin Lee Milam and Kelly Denise Coogan, a jury was unable to reach a unanimous

verdict and a mistrial was declared. On a Motion of the United States, the original Indictment was dismissed. However, on January 22, 1991, Appellant herein was charged in a one-count Information for violation of 18 U.S.C. § 659, Theft from Interstate Shipment in the United States District Court for the Western District of Texas. The Information read in pertinent part as follows:

FIRST COUNT
(18 U.S.C. § 659)

That on or about May 19, 1990, in the Western District of Texas, Defendants,

KEVIN LEE MILAM

willfully and knowingly, and with intent to convert to their own use, did embezzle, steal, take and carry away from a motor truck, a freightliner Tractor bearing Oregon license Y074170, chattels of a value in excess of one hundred dollars, that is, a Lincoln Town Car, VIN: 1LNBM81F7KY782151; a Ford Aerostar, VIN: 1FMCA11U6KZB5282; a Merkur Scorpio, VIN: WF1BT81V7KE892870; a Lincoln Town Car, VIN: 1LNBNM81F9KY732149; a Lincoln Town Car, VIN: 1LNBM8FOKY777678; Ford Mustang Convertible, VIN: 1FABP44E5KF251510; Merkur Scorpio, VIN: WF1BT81V7KE892691; Merkur Scorpio, VIN: WF1BT81V1KE89340; and a Lincoln Town Car, VIN: 1LNBM82FKY700023, which were part of and constituted an interstate shipment of freight and express from California, to Texas, in violation of Title 18, United States Code, Section 659.

Information,
(Appellant's Excerpt at Tab 3)

The judgment reads as follows:

> The Defendant pleaded guilty to an information on January 22, 1991. Accordingly the defendant is adjudged guilty of such count(s), which involve the following offenses: 18 U.S.C. § 659, willfully and knowingly, and with intent to convert to his own use, embezzling, stealing, taking and carrying away from a motor truck, chattels of a value not exceeding $100, that is, motor vehicles, which were part of and constituted shipment of freight from California to Texas. * * * The original indictment is dismissed on the Motion of the United States. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of intermittent confinement pursuant to § 5C1.1(d) of the guidelines, with five (5) months imprisonment in a jail or prison and five (5) months community confinement in a residential facility or halfway house.
>
> *Judgment*
> **(Appellant's Excerpts at p. 5)**

B. Pertinent Facts:

The Appellant in this case pled to an Information charging him with theft of less than One Hundred Dollars, *(See **Information at RI 8**)*. This information limiting the amount of the offense came as a result of a specific plea bargain with the United States Government *(**Plea Bargain at RI 10**)*. This in turn occurred because of a mistrial in which the government failed to unanimously convince a jury of the over $100 charges contained in the **Superseding Indictment (RI 87)**. In spite of this Plea

Bargain and plea to the under $100 offense, the *Presentence Report,* rated the amount of theft as $290,000.00 which raised the Appellant's base level to fourteen *(14)* from the usual under $100 amount theft base offense level of four *(4)*:

> 20. The Base Offense Level is determined under the provisions of § 1B1.3(a)(1), Relevant Conduct. The conduct that is relevant in determining the applicable guideline range in this case shall include all acts and omissions committed or aided and abetted by the Defendant, or for which the Defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, and in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense. § 1B1.3(a)(1).
>
> * * *
>
> | | |
> |---|---|
> | 25. Adjustment for Obstruction of Justice: None | 0 |
> | 26. Adjusted Offense Level: (Subtotal) | 14 |
> | 27. Adjustment for Acceptance of Responsibility | -2 |
> | 28. Total Offense Level | 12 |
>
> ***Presentence Report***
> **at pp. 5, 6.**

Neither of these offense levels were subject to a two *(2)* level reduction for acceptance of responsibility to twelve *(12)* or two *(2)*. The Appellant argues simply that because of his mistrial, plea bargain, and plea to a misdemeanor for under $100 amount only, that he should have

been entitled to a level two *(2)* with a 0-5 range. Since the trial judge was sentencing under a *Presentence Report* which indicated the higher level *(12)* and which stated that probation was unavailable, the Appellant feels that he can claim harm as a result of the gross miscalculation of ten (10) levels:

> 37. If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than 6 months, but not more than ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention, provided that at least one-half the minimum term is satisfied by imprisonment. 5C1.1(d)
>
> ***Presentence Report***
> **at pp. 7, 8**

REASONS WHY THE WRIT SHOULD BE GRANTED

I. THE *FEDERAL SENTENCING GUIDELINES* ARE UNLAWFUL, INVALID, AND UNCONSTITUTIONAL TO THE EXTENT THAT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

II. THE *FEDERAL SENTENCING GUIDELINES* VIOLATE DUE PROCESS TO THE EXTENT THEY REQUIRE CALCULATION OF FINE, IMPRISONMENT, AND RESTITUTION TO BE BASED ON OFFENSE OTHER THAN THE OFFENSE OF CONVICTION.

A. In General:

The Appellant in this case pled to an Information charging him with theft of less than One Hundred Dollars, (See *Information* at Tab 3). This information limiting the amount of the offense came as a result of a specific plea bargain with the United States Government (*Plea Bargain* at Tab 4). This in turn occurred because of a mistrial in which the government failed to unanimously convince a jury of the over $100 charges contained in the Superseding Indictment (at Tab 2). In spite of this Plea Bargain and plea to the under $100 offense, the *Presentence Report*, rated the amount of theft as $290,000.00 which raised the Appellant's base level to fourteen (14) from the usual under $100 amount theft base offense level of four (4):

> 20. The Base Offense Level is determined under the provisions of § 1B1.3(a)(1), Relevant Conduct. The conduct that is relevant in determining the applicable guideline range in this

> case shall include all acts and omissions committed or aided and abetted by the Defendant, or for which the Defendant would be otherwise accountable, that occurred during the commission of the offense of conviction, and in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense, or that otherwise were in furtherance of that offense. § 1B1.3(a)(1).
>
> * * *
>
> | | |
> |---|---|
> | 25. Adjustment for Obstruction of Justice: None | 0 |
> | 26. Adjusted Offense Level: (Subtotal) | 14 |
> | 27. Adjustment for Acceptance of Responsibility | -2 |
> | 28. Total Offense Level | 12 |
>
> ***Presentence Report***
> **at pp. 5, 6.**

Neither of these offense levels were subject to a two level reduction for acceptance of responsibility to twelve *(12)* or two *(2)*. The Appellant argues simply that because of his mistrial, plea bargain, and plea to a misdemeanor of theft under $100 only, that he should have been entitled to a level two *(2)* guideline with a 0-5 penalty range. Since the trial judge was sentencing under a *Presentence Report* which indicated the higher level *(12)* and which stated that probation was unavailable, the Appellant feels that he can claim harm as a result of the gross miscalculation of ten *(10)* levels:

> 37. If the minimum term of imprisonment in the applicable guideline range in the Sentencing Table is more than 6 months, but not more than

ten months, the minimum term may be satisfied by (1) a sentence of imprisonment; or (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes a community confinement or home detention, provided that at least one-half of the minimum term is satisfied by imprisonment. 5Cl.1(d)

Presentence Report,
at pp. 7, 8

B. Argument:

Specifically, the Appellant argues that his base offense level should have been four *(4)* (and later reduced by two a total of *(2)* for acceptance of responsibility), instead of twelve *(12)* because the Federal Sentencing Commission had no authority to calculate imprisonment, fines, or restitution based on collateral offenses which did not result in conviction.

In arguing that this error warrants reversal, vacation of sentence, and resentencing, the Appellant asserts that the United States Supreme Court in the case of *Hughey v. United States,* 110 S.Ct. 1979 (1990) made several important holdings that indicate that only the offense of conviction may be used to calculate the penalty imposed whether it be imprisonment, fine, or restitution. In *Hughey, supra,* the Court held that restitution could not be assessed for injury, damage or losses contained either in dismissed counts or arising from uncharged conduct. Although *Hughey* is a case that involves pre-guideline sentencing, its holdings regarding the meaning of the

word "offense" has a definite relation to guideline sentencing. In the lower case in *Hughey,* this Court held that because the Victim and Witness Protection Act of 1982 appeared to allow trial courts to assess restitution beyond that involved in the offense of conviction "when there is a significant connection between the crimes of conviction and similar actions justify restitution", Victim and Witness Protection Act of 1982. The United States Supreme Court held that absent other explicit intentions of Congress as expressed in the legislature history, that the United States Supreme Court would consider the term "offense" to mean that the law only intended to authorize restitution for losses sustained as the result of the offensive conviction.

This holding is an important consideration in the interpretation of the Federal Sentencing Guidelines because the language of the Victim and Witness Protection Act of 1982, as recodified as part of the Sentencing Reform Act of 1984, Public Law 98-473, *Hughey,* 110 S.Ct. at 1981, n. 1 is virtually identical with the statutory language of the Federal Sentencing Guidelines. Criminal Law and Procedure Technical Amendments, Act of 1986, 100 Stat. 3619. The only difference is that the original language from the Victim and Witness Protection Act is that the phrase "victim of the offense" was changed to "victim of such offense", Criminal Law and Procedure Technical Amendments, Act of 1986, 100 Stat. 3619. In *Hughey,* the government has already conceded that references to "such offense" or "an offense" means the "offense of conviction." *Hughey* at 1982. As in the legislation interpreted in *Hughey,* Congress continually and consistently used the terms "offense", "an offense," "the

offense," "offense committed," and "such an offense," 28 U.S.C. §§ 991-998; 18 U.S.C. §§ 3551-3586; 18 U.S.C. § 3673. The enabling legislation of the federal sentencing guidelines reads as follows:

> § 991. United States Sentencing Commission; establishment and purposes
>
> (a) There is established as an independent commission in the judicial branch of the United States a United States Sentencing Commission which shall consist of seven voting members and one nonvoting member. The President, after consultation with representatives of judges, prosecuting attorneys, defense attorneys, law enforcement officials, senior citizens, victims of crime, and others interested in the criminal justice process, shall appoint the voting members of the Commission, by and with the advice and consent of the Senate, one of whom shall be appointed, by and with the advice and consent of the Senate, as the Chairman. At least three of the members shall be Federal judges selected after considering a list of six judges recommended to President of the Judicial Conference of the United States. Not more than four of the members of the Commission shall be members of the same political party. The Attorney General, or his designed, shall be an ex officio, nonvoting member of the Commission. The Chairman and members of the Commission shall be subject to removal from the Commission by the President only for neglect of duty or malfeasance in office or for other good cause shown.
>
> (b) The purposes of the United States Sentencing Commission are to –

(1) establish sentencing policies and practices for the Federal criminal justice system that –

(A) assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code;

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records *who have been found guilty of similar criminal conduct* while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justices process; and (2) develop means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code. **[Emphasis supplied].**

28 U.S.C. § 991

In as much as 28 U.S.C. § 991 requires the Sentencing Commission to promulgate guidelines consistent with 18 U.S.C. § 3553 we must now look at the language of that statute.:

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. – The court shall impose a sentence

sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) *to reflect the seriousness of* ***the offense,*** to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for *the applicable category of* ***offense committed*** by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2) that is in effect on the date the defendant is sentenced;

(6) the need to avoid unwarranted sentence disparities among defendants with similar records *who have been found guilty of similar conduct;* and

(7) the need to provide *restitution any victims of the offense.*

18 U.S.C. § 3553

Looking at the two laws and especially those phrases emphasized in 18 U.S.C. 3553 it is clear that the same language construed by *Hughey* to mean the offense of conviction and only the offense of conviction is the only language we find in either statute. The United States Supreme Court's decision in *Hughey* must mean that the restitution section of the Sentencing Guidelines Act which is simply a recodification virtually identical language in the Victim and Witness Protection Act of 1982, 18 U.S.C. §§ 3551-3586, can only apply to the offense of conviction; therefore, similar language which relates to fines and imprisonment must be interpreted as limiting punishment to that calculated upon the sentence of conviction alone. If, "the offense," "an offense," "such an offense," "offense of conviction," all mean the same thing, which is what both the government and the Court state in *Hughey,* then the only authority of the federal sentencing commission would be to base guidelines upon the offense of conviction alone. It has been said that in construction a statute one must start with the language of the statute itself, *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723 (1975), *Landreth Timber Co. v. Landreth,* 105 S.Ct. 2297 (1985). It has also been said that the task of courts is to give affect to the will of Congress and where the will of Congress has been expressed in reasonable

plain terms the courts must regard such language as being conclusive, *Consumer Product v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980) and *Griffin v. Oceanic Contractors,* 102 S.Ct. 3250 (1982). Since this language has already been interpreted by the United States Supreme Court in *Hughey* as indicting the will of Congress to mean "offense of conviction" and solely the offense of conviction, any guidelines promulgated by the federal sentencing commission which exceed this mandate are unconstitutional. The Guidelines have not been passed by Congress and do not represent legislation, *INS v. Chadha,* 462 U.S. 919 (1983). To the degree and extent that the federal sentencing commission promulgated guidelines beyond or inconsistent with the enabling legislation these guidelines are invalid, void, non-binding, and unconstitutional, *United States v. Larionoff,* 431 U.S. 864, 873 (1977) and *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 111-12, 117 (1978). Agencies are not free to interpret their enabling statutes as they please, *Securities and Exchange Commission,* supra, especially when Congress has spoken clearly as to a disputed issue, *Griffin v. Oceanic Contractors,* supra. Indeed, in such circumstances, agencies are legally and constitutionally bound to give effect to such language.

C. Specific Reasons Why The Writ Should Be Granted

Literally thousands of United States citizens are sentenced annually pursuant to the Federal Sentencing Guidelines. Whether or not the Federal Sentencing

Guidelines are the result of the Federal Sentencing Commission exceeding its authorization and limitation promulgated by Congress in 18 U.S.C. § 3553 and 28 U.S.C. § 991 should be determined at the earliest practical moment. The prospect of undoing and redoing tens of thousand federal sentencings is too daunting to imagine. The finality and the justice of these sentences will be perpetually in question until the questions raised herein are addressed and decided by this Court.

CONCLUSION AND PRAYER

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Petitioners pray that this Court grant a Petition for Certiorari to the United States Supreme Court and thereafter vacate his sentence and remand his cause for resentencing pursuant to *United States v. Hughey*, supra.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8207
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

KEVIN LEE MILAM,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. EP-90-CR-237-01

(Filed Aug. 20, 1992)

Before JOLLY, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Milam has presented two issues on appeal, both of which rest on his assertion that the Supreme Court's

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

decision in *Hughey v. United States*, 495 U.S. 411, 110 S.Ct. 1979, 109 L.Ed.2d 1085 (1990) precludes the use of relevant conduct in formulating a sentence that was not part of the specific offense conduct of the offense of conviction. Milam also urges that the U.S. Sentencing Commission exceeded its Congressional authority when it promulgated guidelines which would allow a sentencing court to use conduct other than that of the offense of conviction.

These issues were decided against Milam in *United States v. Thomas*, 932 F.2d 1085 (5th Cir.), *cert. denied*, 112 S.Ct. 264 (1991), *cert. denied*, 112 S.Ct. 428 (1991), and *cert. denied*, 112 S.Ct. 887 (1992). The *Thomas* panel rejected these same arguments and, for the same reasons, make Milam's contentions meritless. Milam's conviction and sentence are AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8207

UNITED STATES,

Plaintiff-Appellee,

versus

KEVIN LEE MILLAN,

Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

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ON PETITION FOR REHEARING

(October 7, 1992)

Before JOLLY, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
UNITED STATES CIRCUIT JUDGE